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Nos. 00-1751, 00-1777, and 00-1779

IN THE

Supreme Court of the United States

October Term, 2001

Susan Tave Zelman, et al., *Petitioners*

v.

Doris Simmons-Harris, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE

on Behalf of The Association of Christian Schools International, California Catholic School Superintendents, The Connecticut Association of Independent Schools, The Connecticut Council on American Private Education, The Florida Association of Academic Nonpublic Schools, The Florida Council of Independent Schools, The Indiana Private Education Association, The Kentucky Non-Public Schools Commission, The Lutheran Education Association, The Michigan Association of Nonpublic Schools, The National Catholic Educational Association, The New Jersey Council for American Private Education, The New York Association of Independent Schools, The Oregon Federation of Independent Schools, The South Dakota Christian School Association, The Southern Baptist Association of Christian Schools, The Virginia Council for Private Education, and The Washington Federation of Independent Schools, in support of the Petitioners

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Statement of Interest of *Amici Curiae*

Amici curiae are national and state associations of religious and independent schools. These schools serve the public good by providing rigorous education to children of multiple religious and ethnic backgrounds. These schools produce excellent results measured in terms of educational outputs, including standard tests, grasp of the obligations of citizenship, and service to the community. Religious and independent schools represented in this brief typically deliver their services at a fraction of the cost of education in public schools.

Many of these *amici* filed an *amicus* brief in *Mitchell v. Helms*, 530 U.S. 793 (2000), highlighting factual information about the use of auxiliary aids, including computers, in contemporary American education. *Amici* now wish to call to the attention of the Court important empirical data about the role that religious and independent schools play in the education of economically and educationally disadvantaged children in inner-city schools, especially members of ethic minority groups, throughout the country.

The brief is filed with the consent of the parties. Counsel for the amici authored the brief, and no person other than the amici made a monetary contribution toward the preparation or submission of the brief. Particular statements of interest of the individual *amici curiae* are attached in Appendix A.

Summary of Argument

In *Agostini v. Felton*, 521 U.S. 203 (1997), this Court charted a new course in the application of the First Amendment Establishment Clause to federal and state programs providing financial aid to education that include children in religious schools among its recipients. The Court announced three primary criteria to evaluate whether government aid has the effect of advancing religion: (1) whether public assistance would probably lead to "government inculcation of religious beliefs," *id.* at 223, (2) whether the aid is distributed on the basis of "criteria that neither favor nor disfavor religion," *id.* at 231, and (3) whether the aid would probably lead to excessive entanglement of the government with religion, *id.* at 233.

Amici leave the development of the arguments about these three criteria to the parties. We focus here on a crucial portion of the record overlooked by the court of appeals, and on valuable empirical data relating to the actual effects of programs such as that challenged here.

In Part I *amici* call attention to the massive loan of state tax funds to the Cleveland City School District at the time of the economic failure of that school district in 1995. This uncontested fact was overlooked by the court of appeals, but is highly relevant to a determination of whether the Ohio Legislature singled out religious schools in Cleveland for any special economic benefit. The legislature also provided for tutorial assistance grants for public school children in a number equal to the alternate choice scholarship grants awarded to pupils selecting alternate schools. Ohio Revised Code [R.C.] §3313.978(B). Both of these aspects of the Cleveland program illustrate that the beneficiary class is broad, including parents of children in all forms of schools, public, religious, and independent. Under these circumstances it is constitutionally permissible to include religious schools in a major effort to improve the quality of education for all children in Cleveland, allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

In Part II A *amici* show the connection between the requirement of a secular purpose and the determination of the primary effect of legislation that provides financial aid to education in a variety of settings, public, religious, and independent.

In Part II B we urge that the inquiry about the primary effect of a policy is an empirical question deserving an empirical answer. We provide research data concerning the actual effects of the Ohio Scholarship Program. The religious schools in these two cities where parental choice programs have been operational have the following characteristics. First, they are diverse economically in the sense that they offer excellent education to a significant percentage of economically disadvantaged children. Second, they are diverse in religious background, comprising many children who are not members of the sponsoring religious community. Third, they are racially

and ethnically diverse, offering the reality of integrated education in a city struggling to overcome the effects of a dual system violative of the Fourteenth Amendment. The primary or principal effect of the Cleveland programs is not to promote or advance religion, but to empower parental choice and to elevate the level of learning of the children in all schools, public, religious, and independent.

In Part II C we present reports of empirical data showing that the effects of the Scholarship and Tutorial Programs in Cleveland have been replicated in major national studies of the quality of education in religious and independent schools throughout the United States. In addition to the three effects noted above in Part II B, we show three positive effects that recur in religious and independent schools. First, children attending religious and independent schools are well prepared to undertake the obligations of citizenship. Second, they advance beyond secondary education to undertake higher education, with important ramifications for the economic well-being of these students and for the republic. Third, religious and independent schools contribute powerfully to the public good by saving taxpayers billions of dollars in educational expenses.

In Part II D we offer a succinct summary of comparative studies of educational financing in other constitutional democracies. We note that the recent reliance of this Court on the nondiscrimination principle in the funding of the education of all children brings this country's jurisprudence into line with that of all other constitutional democracies in the world. The data from other jurisdictions illustrate that the inclusion of religious schools within a broad range of educational options has the effect of increasing support for all forms of education.

Argument

I. The Ohio Legislature Did not Single out Religious Schools in Cleveland for any Special Economic Benefit, but Included these Schools in a Major Effort to Improve the Quality of Education for all Children in Cleveland, Allocating Aid on the basis of Neutral, Secular Criteria that neither Favor nor Disfavor Religion, and Making it Available to both Religious and Secular Beneficiaries on a Nondiscriminatory Basis.

In 1995 a severe financial crisis in the Cleveland City School District [CCSD] seriously affected the educational performance of children attending public schools in that city. No. 00-1751, State Pet. App. 62a. On March 3, 1995, a federal district court placed the CCSD under the control of the petitioner superintendent of public instruction. *Reed v. Rhodes*, 934 F.Supp. 1533, 1560 (N.D.Ohio, 1996). Prior to this order, the State of Ohio had advanced about $40 million to the CCSD in the form of a loan. Immediately following the takeover, the State Superintendent arranged for state controlling board approval of an additional $30 million dollars in loans from private lenders. As part of the 1994 Consent Decree entered in the school desegregation case, the State agreed to pay Cleveland $295 million over seven years, with the understanding that these funds were restricted to items related to desegregation. *Reed v. Rhodes*, 869 F.Supp. 1274 (N.D.Ohio 1994). In short, the State of Ohio did not abandon the CCSD, but worked overtime in both the legislative and executive branches to arrange for a massive infusion of cash to shore up the troubled school district. The Court need not turn a blind eye to plain facts of common knowledge.

Under *Frothingham v. Mellon*, 262 U.S. 447 (1923), no plaintiff has standing to challenge these financial arrangements between the State of Ohio and the local school district. Hence they were not featured in the record of this case. When situated within the context of the entire legislative response to the crisis in Cleveland, however, the massive transfer of resources from the state budget to the budget of the CCSD is a telltale indicator that the program under attack in this case was anything but an assault upon the troubled public schools of that city. Still less did the legislature attempt to confer an economic benefit upon a particular religious community or group of communities. The multi-million dollar state support of the CCSD is highly relevant to the determination of the breadth of the beneficiary class in this program. Viewed as a whole, the response of the state legislature to the crisis in Cleveland was clearly designed to assist children in all forms of schools, public, religious, and independent.

As part of its aid package the legislature also enacted a program that provides tuition assistance for children in kindergarten through the eighth grade. R.C. § 3313.975(B). The

scholarships may be used at adjacent suburban public schools or at religious and independent schools within Cleveland. The program mandates a preference for students from low-income families, defined statutorily as families with income below 200% of the federal poverty line. R.C. 3313.975(A). Scholarships may be awarded "to students who are not from low-income families only if all students from low-income families have been given first consideration for placement." No. 00-1751, Pet. App. 4a.

The Ohio Supreme Court found the scholarship and tutorial program challenged in this litigation permissible under this Court's jurisprudence on the First Amendment Establishment Clause. *Simmons-Harris v. Goff*, 711 N.E. 2d at 211. But the Ohio Supreme Court held that it offended the one-provision Clause of the Ohio Constitution, § 15 (D), art. II, because of its inclusion in an appropriations bill that included the massive assistance from the state to the CCSD. *Id.* at 214-15. The legislature immediately reenacted the legislation challenged here.

The state's support of the *public schools* of the CCSD is highly relevant to the federal question of the permissibility of the scholarship and tuition assistance program. This Court has repeatedly insisted that the breadth of the beneficiary class is a telling indicator of the permissibility of a program challenged under the Establishment Clause. For example, in *Mitchell v. Helms*, 530 U.S. 793 (2000) this Court sustained a federal program of assistance for auxiliary aids such as library books, maps, and computers because the recipients of this aid were children at all forms of schools, public and nonpublic. *See also Agostini v. Felton*, 521 U.S. 203 (1997) (remedial reading and mathematics teachers may provide assistance to educationally and economically disadvantaged children on the site of their schools, whether they are public schools or religious schools); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (same assistance for hearing impaired child attending religious school that he received while attending public school); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (openness of forum at a state university on a neutral basis "to a broad class of nonreligious as well as religious speakers ... is an important index of secular effect").

The court of appeals relied on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), in which this Court invalidated a tax credit designed

in which this Court invalidated a tax credit designed exclusively for parents of children attending religious schools. *Simmons-Harris v. Zelman*, 234 F. 3d 945 (6th Cir. 2000), No. 00-1751, Pet. App. 13a-17a. *See also Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (invalidating a Pennsylvania program of assistance because "the State [had] singled out a class of its citizens for a special economic benefit"). In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court sustained a Minnesota tax deduction for educational expenses on the ground that it was available to all parents on a neutral basis, whether the expenses were incurred in a public school or a religious or independent school. The court of appeals overlooked the crucial point on the breadth of the beneficiary class that this Court emphasized in both cases. *Compare Nyquist*, 413 U.S. at 783, n.38 (differentiating "significantly religious character of the statute's beneficiaries ... from ... public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited") with *Mueller*, 463 U.S. at 398 (citing note 38 in *Nyquist*) and 408-09. The program at issue here is thus permissible because the Ohio legislature did not single out any religious community to confer upon it an economic benefit, but included religious schools along with all other schools in a major effort to improve the quality of education for all children in Cleveland.

In making the critical determination of the scope of the beneficiary class in this program, the Court should situate the scholarship program within the entire legislative package responding to the problem of failing schools in Cleveland: massive direct aid to the CCSD, tutorial assistance for children attending the public schools operated by the CCSD, and scholarship assistance to parents whose children attend independent or religious schools, all of which agree to refrain from discrimination on the basis of race, color, or religion. In short, the Ohio Legislature allocated aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion ... [and made it] available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

II. Social Science Data Can Assist the Judicial Inquiry into the Purpose and Primary Effect of Public Funding of Education in Religious and Independent Schools.

A. The Value of Empirical Research in Discerning Actual Effects of Legislation.

In reviewing challenges to public funding of education in religious schools under the Establishment Clause, this Court has insisted that the purpose of such programs must be secular. *Mitchell v. Helms*, 530 U.S. 793, 807-808 (2000); *Agostini v. Felton*, 521 U.S. 203, 211 (1997); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 5 (1993); and *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The point of this inquiry is not to ask a vague question about the purpose of law in general, but a very specific and pointed question about the real purpose of the program under review. The demand of secularity is that the program have a legitimate public purpose, one that serves the common good of all. In the language of the Williamsburg Charter, a bicentennial document celebrating religious freedom, "'Secular purpose'... should not mean `non-religious purpose' but `general public purpose.' Otherwise, the impression is gained that `public is equivalent to secular; religion is equivalent to private.'" 8 *J. L. & Relig.* 5, 14 (1990).

This Court has routinely found that a wide variety of federal and state programs of financial support for education in religious schools have met the standard of secular purpose. *Mitchell*, 530 U.S. at 810, 813; *Agostini*, 521 U.S. at 211; *Zobrest*, 509 U.S. at 5, note 4. The *Mueller* Court articulated several purposes that fulfilled the requirement of secularity or neutrality:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there

> is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. *Mueller*, 463 U.S. at 395.

All of the purposes that the Court found to underlie the Minnesota statute sustained in *Mueller* are of equal application to the Ohio program challenged here.

Even where the Court has concluded that a particular program is constitutionally infirm, it has done so on another ground, not for want of a valid secular purpose. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 409-11 (1985) and *Grand Rapids School District v. Bell*, 473 U.S. 373, 383 (1985) overruled in *Agostini v. Felton, supra*; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80 (1973), distinguished in *Mueller, supra*; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

To inquire about the primary and principal effect effect of a program is, of course, to raise an empirical question. Does it actually advance religion? Does it actually inhibit or impede religion, for example, by entangling the government excessively in religious matters in which it has no business or competence? This Court has intuitively sensed that only empirical data suffice to answer empirical questions. For example, in *Nyquist, supra*, the Court rejected the idea that, in determining the effect of a statute, the Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision. 413 U.S. at 410.

Earlier cases on the permissibility of aid to education in religious schools, such as *Lemon* and *Nyquist*, came before the Court on motions for summary judgment, without a fully developed record. *See, e.g.*, Charles H. Wilson, "The Facts Matter: The Case for Accurate Records in Constitutional Adjudication," in Edward McGlynn Gaffney, Jr., ed., *Private Schools and the Public Good* 189-91 (1980). But this case comes before the Court with a record reflecting several years of the actual operation of the program, in part because this Court

granted a stay pending appeal, 528 U.S. 983 (1999). Hence the Court may fashion an opinion grounded upon an inspection of known results, not on the shifting sands of lawyers' speculation about "imaginable but totally implausible evils." *Wolman v. Walter*, 433 U.S. 229, 260, note 6 (1977) (Marshall, J., concurring in part and dissenting in part); see *Mitchell v. Helms*, 530 U.S. at 823; *id.* at 855 (O'Connor, J., concurring in judgment).

The record in this case is replete with rich information about the actual effects of the Cleveland program in the lives of parents, teachers and administrators. No. 00-1777, Pet. App. 80a-188a. In addition, the Court may consider empirical studies that are highly relevant to the inquiry about the principal and primary effect of the Ohio Scholarship Program. [1]

The Court may also assess this program in the light of data about a similar program in Milwaukee sustained by the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998), cert. denied, 525 U.S. 997 (1998). Like the Cleveland program, the Milwaukee program has been functioning for several years. Hence its actual effects are accessible to the Court.[2]

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[1] For empirical research on the Cleveland programs conducted under the auspices of the Program in Education Policy and Governance [PEPG], Kennedy School of Gov., Harvard Univ., see Jay P. Greene, William G. Howell, and Paul E. Peterson, *Lessons from the Cleveland Scholarship Program* (1997), Peterson, Greene, and Howell, *New Findings from the Cleveland Scholarship Program: A Reanalysis of Data from the Indiana University School of Education Evaluation* (1998); Peterson, Howell, and Greene, *An Evaluation of the Cleveland Voucher Program After Two Years* (1999); Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland*, (1999) These papers are published on the Internet at http://www.ksg.harvard.edu/pepg

[2] For a generally positive assessment of the Milwaukee Parental Choice Program [MCPC], see John F. Witte, *The Market Approach to Education — An Analysis of America's First Voucher Program* (2000) ("Choice ... focuses attention on parents as critical actors in a system where they are often neglected or relegated to quite subservient support roles.... if packaged properly, it invokes deep value structures revolving around the twin poles of freedom of choice and the unjust denial of equal opportunity.") Witte provided annual assessments of the MCPC in its first five years; see Witte et al. *Fourth-Year Report, Milwaukee Parental Choice Program*, (Dept. of Polit. Sci., Univ of Wisc.-Madison,

The Court may probe the effects question by exploring what is known generally about the quality of education in religious and independent schools in urban areas throughout the United States. We discuss these data in section II C below. When attention is paid to research studies, hunches can yield to hard data. Canards can give way to reliable information. A priori speculation can be replaced by empirically grounded facts. The genius of the common law – attention to the facts of

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1994); Witte et al. *Fifth Year Report: Milwaukee Parental Choice Program* (1995); Witte , "The Milwaukee Voucher Experiment," *Educ. Research and Policy Analysis* (1998). For research studies of the MCPC conducted under the auspices of the PEPG, see Jay P. Greene and Paul E. Peterson, *Methodological Issues In Evaluation Research: The Milwaukee School Choice Plan* (1996); Greene, Peterson, & Jiangtao Du, *Effectiveness of School Choice: The Milwaukee Experiment* (1997); see also Greene, "Effectiveness of School Choice: The Milwaukee Experiment," *Educ. & Urban Society*, 190-213 (Feb. 1999); Greene, et al., "School Choice in Milwaukee: A Randomized Experiment" in Paul Peterson and Bryan Hassel, eds., *Learning from School Choice* (1998). For an economic analysis of the progress in the MCPC, see Caroline M. Hoxby, *School Choice and School Productivity (or Could School Choice be a Tide that Lifts All Boats?)* 28-40 (2001). http://www.schoolchoiceinfo.org/servlets/SendArticle/118/hoxby.pdf. Dr. Howard L. Fuller, Director of the Institute for the Transformation of Learning [ITL] at Marquette University and former Superintendent of Milwaukee Public Schools has independently confirmed the validity of these studies. Fuller and S. White, *Expanded School Choice in Milwaukee — A Profile of Eligible Students and Schools*, Wisc. Policy Research Institute Report, Vol. 8, No. 5 (1995); Fuller, *The Impact of School Choice on Racial and Ethnic Enrollment in Milwaukee*, ITL, Current Education Issues [CEI] No. 99-5 (1999); Fuller, *The Fiscal Impact of School Choice on the Milwaukee Public Schools*, ITL, CEI No. 99-2, March 1999; Fuller and George. Mitchell, *Selective Admission Practices? Comparing the Milwaukee Public Schools and the Milwaukee Parental Choice Program*, ITL, CEI No. 2000-01(2000);Fuller and Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools*, ITL, CEI No. 2000-02 (2000) Fuller has also situated the controversy over the MPCP within the context of a struggle of racial minorities to achieve for their children the same degree of choice about educational quality that middle-class Americans take for granted. Fuller, *The Continuing Struggle of African Americans for the Power to Make Real Educational Choices* (2000) Fuller, *The Saturation Campaign of Lies and Distortions about Educational Vouchers* (2000). Many of Fuller's papers are published on the Internet at http://www.schoolchoiceinfo.org

each case – can guide constitutional analysis.

As the Court becomes increasingly familiar with the jurisprudence of other jurisdictions, it can also take advantage of comparative studies on the actual effects of educational programs in other jurisdictions. We call special attention to countries with constitutional prohibitions of an established religion, such as Australia and the Netherlands. We discuss these data in section II D below.

B. The Primary and Principal Effect of the Ohio Scholarship Program Has not Been to Advance Religion, but to Empower the Involvement of Economically Disadvantaged Parents in the Quality of their Children's Education, to Promote Actual not Notional Racial Integration in Religious and Independent Schools, and to Achieve Excellent Educational Outputs on a Religiously Neutral and Nondiscriminatory Basis.

The court of appeals invalidated the Ohio Scholarship Program on the view that its primary effect was to "promot[e] sectarian schools." No. 00-1777, Pet. App. 28a. Laying aside the regrettable label "sectarian school," *Mitchell v. Helms*, 530 U.S. at 826, *amici* note that the court of appeals supported its conclusion merely by counting of the number of *religious schools* participating in the scholarship program, *id.* at 27a, without probing the religious identity of the *students themselves*. This is the very sort of mistaken and superficial analysis that this Court repudiated in *Mueller*, 463 U.S. at 401(rejecting relevance of statistic that 96% of the children in Minnesota private schools in 1978-1979 attended religiously affiliated institutions, or that the bulk of the deductions would be claimed by parents of children in religious schools).

When sharper focus is placed upon the characteristics of the students enrolled in the Cleveland scholarship program, we learn three things about these children.

1. Religious Schools Serve Economically Disadvantaged Children

A large percent of children from economically disadvantaged households would not be able to enroll in these schools without the scholarship program challenged in this case. As noted above, the statute mandates a preference for students from low-income families, defined as below 200% of the fed-

eral poverty index. R.C. 3313.975(A). According to the current Federal Poverty Guidelines, that means annual income of less than $35,300 for a family of four. See *Federal Register* Vol. 66, No. 33, Feb. 16, 2001, at 10695-97 (defining "poverty" for family of 4 as income of $17,650). Another measure of the economic need of these children is that the vast majority of them qualify for federally subsidized hot lunch programs.

2. Religious Schools Serve Children of Racial and Ethnic Minority Groups

The overwhelming majority of the children in the religious schools participating in the scholarship program are members of racial and ethnic minority groups. For over three decades the CCSD has been plagued with devastating consequences flowing from a dual public school system held to violate the Fourteenth Amendment. *Reed v. Rhodes*, 422 F.Supp. 708 (N.D. Ohio 1976); *Reed v. Rhodes*, 455 F.Supp. 546, 568 (N.D. Ohio 1978) (remedial order of "comprehensive, systemwide plan of actual desegregation"); *Reed v. Rhodes*, 869 F.Supp. 1274 (N.D. Ohio 1994) (enforceable consent decree); *Reed v. Rhodes*, 934 F.Supp. 1533, 1538-39 (N.D. Ohio 1996) ("total fiscal and administrative collapse" of CCSD), *id.* at 1560 (order directing State Board of Education and State Superintendent to "assume immediate supervision and operational, fiscal and personnel management of the District"), *id.* at 1558 (modifying Consent Decree and terminating judicial supervision of student-school assignments), aff'd, 179 F.3d 453, 473 (6th Cir.1999). The district court found that the district was unitary with respect to all its remaining obligations. *Reed v. Rhodes*, 1 F.Supp.2d 705 (N.D. Ohio 1998), aff'd, 215 F.3d 1327 (6th Cir. 2000). Finally, the consent decree obligations terminated on June 30, 2000.

Against the background of this unpretty picture, one important effect – if not the "primary and principal" effect – of the Cleveland scholarship program is the experience of voluntarily chosen racial integration occurring in the religious and independent schools participating in the scholarship program. A leading researcher at the Kennedy School of Government summarizes the findings of his study of this effect of the Cleveland program as follows:

> Despite the claims of critics, school choice in Cleveland contributes to racial integration by providing

> families with access to private schools that, on average, are better racially integrated than are the public schools in the Cleveland metropolitan area. Nearly a fifth (19%) of recipients of a voucher in Cleveland attend private schools that have a racial composition that resembles the average racial composition of the Cleveland area (defined as having a proportion of minority students in the school that is within 10% of the average proportion of minorities in metropolitan Cleveland). Only 5.2% of public schools students in the Cleveland metropolitan area are in comparably integrated schools. More than three-fifths (60.7%) of public school students in metropolitan Cleveland attend schools that are almost entirely white or almost entirely minority in their racial composition. Half of the students in the Cleveland Scholarship Program are in comparably segregated schools. This better integration in private schools participating in the choice program is achieved without sacrificing the economic and religious heterogeneity of those schools. Of all of the students who attend a publicly-financed school of choice in Cleveland, only 16.5% currently attend a religious school. Yet the evidence on racial integration suggests that access to a choice program that includes religious schools makes a significant contribution to promoting racial integration in Cleveland schools. Jay P. Greene, "The Racial, Economic, and Religious Context of Parental Choice in Cleveland," at 2 (Program on Educ. Policy & Gover-nance, Kennedy School of Government, Harvard Univ., 1999) http://www.ksg.harvard.edu/pepg/papers.html

3. Religious Schools Serve Children Who Are not Members of the Sponsoring Religious Community

The overwhelming majority of the children participating in the scholarship program are not of the same faith as the religious community that sponsors the schools in which they are enrolled. For example, the Hanna Perkins School petition notes that in Our Lady of Peace School, sponsored by the Catholic Church, "99% of our children are minority pupils. At least one-half of the families are at or below poverty level.

85% of the pupils are not of the Catholic faith." No. 00-1777, Pet. 5-6, citing R. 34 Hanna Perkins Opp. to TRO Exh. 1, pg. 1.

The same petition graphically illustrates the mistake of identifying the religion of the students benefiting from this program with the religious community sponsoring the schools they attend. No. 00-1777, Pet. 6. This sort of detail in this record should be unsurprising for two reasons. First, the Cleveland program prohibits admission restrictions based on religion. R.C. §3313.976(A)(4). Second, the scholarships are awarded by lottery and without regard to religion. R.C. §3313.977(A). What might be surprising is that these data are replicated in cities throughout the country, a point to which we now turn.

C. Empirical Data on the Effects of Scholarship Program in Cleveland are Replicated in Major National Studies of the Quality of Education in Religious and Independent Schools throughout the United States, Which Serve the Public Good by Training Children to Undertake the Obligations of Citizenship, by Enabling them to Pursue a College Education, and by Saving Taxpayers Billions of Dollars in Educational Expenditures.

Before analyzing national studies about the quality of religious and independent schools in America, we report the same data sets mentioned in Part II-B above about children attending religious schools in America.

First, religious and independent schools in inner-cities provide an important service to children from economically disadvantaged families, as measured by nearly open admissions, high retention, sliding scale tuition and outright grants, low socioeconomic status of students and ethnic minority status. Catholic schools in particular serve large number of low-income non-Catholics in the inner cities. Joseph M. O'Keefe & J. Murphy, "Ethnically Diverse Catholic Schools: School Structure, Students, Staffing and Financing," in J. Youniss & J. Convey, eds., *Catholic Schools at the Crossroads: Survival and Transformation* 117-36 (2000). See also NCEA, *Catholic High Schools: Their Impact on Low-Income Students* (1986). These schools are not public in the sense of being operated by the government, but they most emphatically are public in the sense of granting access to children of all economic and racial and ethnic backgrounds. These schools serve a valid purpose of providing an excellent education to children with multiple challenges to overcome: membership in a racial or ethnic minority, economic disadvantage, and educational disadvantage.

Second, religious schools serve a large number of children from racial and ethnic minorities. For example, the minority student enrollment in Catholic elementary and secondary schools in the current academic year throughout the nation is 680,042, which is 25.6% of the total enrollment of 2,647,301. Of these students, 103,200 (3.9%) are Asian; 212,845 (8%) are African American; 288,391 (10.9%) are Hispanic; 12,558 (.5%) are Pacific Islander,; 44,964 (1.7%) are multiracial; and 1,967,259 (74.4%) are white. Source: NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 20, http://www.ncea.org/PubPol/databank.html.

These data, moreover, reflect a considerable growth in the diversity of these schools. The percentage of minorities in Catholic schools has more than doubled in the past 30 years. In 1970, minorities accounted for 10.8% of the Catholic school population, in 1980 it had increased to 19.4% and in 2001 it is at 25.6%. In the same time period, the percentage of African American enrollment increased from 6.5% to 8.0%. The percentage of Asian Americans increased from 0.5% to 3.9%. The Hispanic enrollment rose from 5.2% to 10.9%.

The most recent data on minority enrollment from the most populous state in the nation corroborate the data reported by the intervenor schools in No. 00-1777. Pet. 6, *supra*. The percentage of children from ethnic minority groups in Catholic elementary schools in California (56.9%) is almost as high as the percentage of children from ethnic minority groups in the elementary and secondary schools (K-12) operated by the State (63.1%). Source: Calif. Dept. of Educ., *Factbook 2001*. Minority enrollment in Catholic schools is highest in the region with the largest number of Catholic schools; 70.51% of the children attending Catholic elementary schools in the Archdiocese of Los Angeles are minority students. In Oakland the minority figure in Catholic schools is 60.66%, and in San

Francisco it is 54.89%. Source: Calif. Catholic Conference, *California Catholic Education, Annual Report, 2001*

Third, religious schools provide educational services to a large number of children who are not members of the faith of the sponsoring religious community. In the current academic year 358,349 non-Catholic students attend Catholic schools nationwide. Non-Catholic student enrollment has risen from 2.7% in 1970 to 11.2% a decade later and today is 13.6%. For percentages of non-Catholic enrollment on a regional and national basis, see NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 21, http://www.ncea.org/PubPol/databank.shtml

Both religious and public schools serve the public good. Since programs such as the one challenged here include children attending religious schools within a broad beneficiary class, they are not likely to have the impermissible effect of advancing religion. On the contrary, the more problematic governmental classification would be to set up an elaborate scheme of benefits from which only the parents of children attending religious schools would be excluded on an a priori basis.

We turn now to the empirical studies of the quality of education in religious schools. Beginning in the early 1980s many researchers have analyzed large federal data on academic achievement known as "High School and Beyond" [HSB]. The focus of this research was principally upon the largest group of nonpublic schools, those operated by the Catholic church, where they found very positive educational effects that could not be accounted for by extrinsic causes.[3]

Major research studies indicated that Catholic schools

[3] Although empirical studies of other schools has not yet been undertaken with the same rigor, it is reasonable to expect that studies of other religious and independent schools with a similar educational mission would yield conclusions at least as positive as those disclosed in the studies of Catholic schools. For example, a very high percent of children in Hebrew-day schools in southern California associated with Agudath Israel come from economically disadvantaged families, but perform well in educational outputs. It is more problematic to conclude that mechanisms that produce positive results in religious schools are replicable in public schools. *See, e.g.*, Stephen S. Sugarman and Frank Kemmerer, eds. *School Choice and School Controversy* 91 (2000).

were particularly effective for members of racial and ethnic minority groups. For example, Dr. Andrew M. Greeley of the National Opinion Research Center at the University of Chicago undertook a study of minority students based on the High School and Beyond [HSB] data set maintained by the National Center for Education Statistics [NCES]. Greeley found that Catholic high schools are not "rich men's segregated enclaves," as they were mislabeled during the debate in the 1970s over tuition tax credits. *Catholic High Schools and Minority Students* 10 (1982). Half of the black students in this study were non-Catholics; 95% of these schools admitted non-Catholic students. *Id.* at 11, note 3.

The principal purpose of this study was to determine why black and Hispanic students in Catholic secondary schools display much higher levels of academic effort and achievement than their counterparts in public schools. *Id.* at 3. Since the cost of tuition in a Catholic high school represents a high percent of income of minority families, Greeley proceeded on the assumption that families who laid out this expenditure out of very scarce resources believed that their children would receive a better education in these schools than in the "free" schools; and he analyzed carefully the expectations of parents under these circumstances. *Id.* at 13-27.

Greeley concluded, however, that family input alone could not explain the outcomes achieved by these students, measured in terms of academic performance, homework, grade point average, and college aspiration. For example, Greeley found that in all three racial and ethics groups (white, black and Hispanic), students in Catholic schools were twice as likely to do more than five hours of homework a week than their public school counterparts, *id.* at 44. Greeley described a genuine "school effect" above and beyond the input or expectations of the family. He attributed the Catholic school effect to ownership of the schools by religious orders in most of these schools, to more regular discipline, and to a higher quality of teaching in these schools. *Id.* at 107. According to Greeley, the "effect of Catholic schools seems to be especially powerful on the multiply disadvantaged – minority students whose parents did not attend college, who themselves have not qualified for academic programs." *Id.* at 108; *see also* 91.

Dr. James Coleman and his associates at the University of

Chicago reached similar conclusions from the HSB data. James S. Coleman, Thomas Hofer, and Sally B. Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* (1982); James S. Coleman and Thomas Hofer, *Public and Private High Schools: The Impact of Communities* (1987). After adjusting for self-selection, a recent analysis of the HSB data found that sophomores in Catholic schools are more likely to graduate with their class. W. Sander & A.C. Krautmann, "Catholic Schools, Dropout Rates and Educational Attainment," 33 *Econ. Inquiry* 217 (1995).

The research by Greeley and Coleman and his associates was ground-breaking and preliminary. The solidity of their central conclusions over time was confirmed in a major study a decade later. Anthony Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* (1993). These researchers concluded that Catholic high schools "achieve relatively high levels of student learning, distribute this learning more equitably with regard to race and class than in the public sector, and sustain high levels of teacher commitment and student engagement." *Id.* at 297. Their research was both analytic and normative, on the view that "a study of the moral premises of the Catholic school can constructively contribute to a debate about the kinds of schools we seek for all our children." *Id.* at 345, note 4.

Other researchers have also found a positive "school effect" for children in Catholic schools J. Convey, *Catholic Schools Make a Difference: Twenty-five Years of Research* (1992); Youniss & Convey, *Catholic Schools at the Crossroads:* (2000).

Further positive results have emerged from analysis of the National Educational Longitudinal Study [NELS] data set. One study discovered a positive Catholic school effect in the analysis of tests of academic achievement in the NELS data. A. Garnoran, "Student Achievement in Public Magnet, Public Comprehensive, and Private City High Schools" 18 *Educ. Evaluation & Policy Analysis* 1 (1996). Another analysis of the NELS data discovered a low drop-out rate in Catholic high schools. J.D. Teachman, K. Paasch, & K. Carver, "Social Capital and the Generation of Human Capital," 75 *Social Forces* 1343 (1997).

An analysis of the National Assessment of Educational

Progress [NAEP] data on math achievement of fourth graders found that students from less supportive family environments achieved higher scores when they attended Catholic schools. A.M. Jones, *Differential Effectiveness: Catholic and Public School Fourth Graders' Performance on the 1992 NAEP Mathematics Assessment,* Unpublished doctoral dissertation, Boston College (1997).

A study using census data and the annual survey from the NCEA shows higher graduation rates for Catholic school students. D. Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Economics* 98 (1997); *see also* NCEA, *The Catholic High School: A National Portrait* (1985).

A psychological study recently found a high degree of achievement and self-esteem among students of color who attend Catholic schools. J. Bempechat, *Against the Odds: How "At-Risk" Students Exceed Expectations* (1998).

When evaluated in the context of nondiscriminatory programs such as the scholarship and tutorial programs in Cleveland, these research findings reinforce the conclusion that the primary and principal effect of such programs is not to advance religion, but to advance the public good by serving the educational needs of all children. They do a particularly good job of training children to undertake the obligations of citizenship and of motivating them to complete secondary education well and to pursue a college education. And it is uncontroverted that religious and independent schools save taxpayers billions of dollars in educational expenditures each year. We highlight each of these three beneficial effects of religious and independent schools in America.

1. Training children for the obligations of citizenship

First, religious and independent schools do a good job of training children for the obligations of citizenship. Far from being "antidemocratic," these schools produce impressive achievements in civics that are higher that those in public schools. For example, a federal study in 1997 found that students in religious and independent schools discussed current events more regularly than students in public schools. K. Chandler & C. Chapman, *Student Interest in National News and Its Relation to School Courses* (U.S. Dept. of Educ. NCES publication no. 97-970),

In a national sample of tests given at grades 4, 8 and 12, students in religious and independent schools had higher average scores than their peers in public schools. Students in Catholic schools had higher average scale scores than students in public schools at all three grades, and they were comparable to students in public schools in studying the Constitution, Congress, the executive branch, how laws are made, the court system, political parties, state and local government, other countries and international relations. C. Chapman, K. Chandler, & R.G. Niemi, *The Civic Development of 9th through 12th Grade Students in the United States* (U.S. Dept of Educ. NCES 1998). The report concludes:

> After controlling for a host of other factors described above, private school students tend to have higher political knowledge scores, are more likely to have confidence in their ability to speak at public meetings, are more likely to accept the presence of controversial books in public libraries than are public school students. *Id.* at v.

Empirical research indicates that private schools are not "parochial" in the sense of narrow self-interest or lack of breadth. As Table 1 in Appendix B illustrates, religious and independent schools train men and women who are well informed and are more likely to be active citizens than their public school cohorts.

The data maintained by the government about religious and independent schools supports the conclusion that these schools are concerned with civic virtue and the common good. For students in religious and independent schools, moreover, civic engagement goes beyond knowledge and self-described attitudes; they perform community service at higher levels than their colleagues in public schools. Table 2, Appendix B.

This trend continued through the 1990s, with welcome improvement in students attending public schools. For both 1996 and 1999, students in public schools (47 percent in 1996 and 50 percent in 1999) were less likely to report participation in community service than students in religious schools (69 percent in 1996 and 72 percent in 1999). In 1999, students attending public schools were less likely to participate in community service than were students in independent schools (50

percent compared to 68 percent). In addition, students from religious schools were more likely than those from public schools to report service-learning experiences for both 1996 and 1999. C. Chapman, & B. Kleiner, *Statistics in Brief, November 1999, Youth Service Learning and Community Service among 6th and 12th Grade Students in the United States: 1996 and 1999* p. 5 (U.S. Dept. of Educ. NCES publication no. 2000-028). In short, data gathered and analyzed by the federal government, refute the claim that religious schools are anti-democratic. In fact, students in these schools are more knowledgeable and more engaged in the political process than their colleagues in public schools.

2. Rigorous standards of academic achievement

Second, by demanding a high level of academic rigor, religious and independent schools contribute to the intellectual resources of the nation. At the most basic level, students are present for instruction in religious and independent schools, which have far less absenteeism and fewer cut classes than in public schools. T.D. Snyder & C.M. Hoffman, *Digest of Education Statistics 2000* 184 (U.S. Dept. of Educ., Nat. Center for Education Statistics No. 2001-034).

As noted above, religious and independent schools have more stringent requirements. This translates into a higher success rate for completion of secondary education. For example, 44.8% of religious and independent schools and 19.8% of public schools met the high school graduation recommendations of the National Commission on Excellence in Education. Nearly 88% of students in religious and independent high schools apply to college, compared to 57.4% of public high school students. Though students at religious and independent high school students comprise only 7.5% of that population nationally, they account for 20% of the nation's twelfth graders who took AP examinations in 1998. Students at religious and independent high schools scored higher on the SAT than public school counterparts, as indicated in Table 3 in Appendix B.

Along with greater preparedness for college, students in religious and independent schools have higher occupational aspirations. Data in the NELS set disclose that when asked about expected occupations in grades 8, 10, and 12, two-thirds of Catholic-school students chose "professional, business or managerial" as opposed to 59% of those in other private

schools and only 49% of those in public school. Snyder & Hoffman, *Digest of Education Statistics 2000* 157. Students at religious and independent schools also perform better on the National Assessment of Educational Progress in a range of subject areas, including reading, *id.* at 129; math, *id.* at 140; science, *id.* at 145-46; and geography and U.S. history, *id.* at 138.

Most recently, students at religious and independent schools scored significantly above the national average on the International Math and Science Study, which measured math and science performance in 38 countries around the world. The scores from religious and independent schools were so impressive that, had they been the norm for the nation, they would have propelled the U.S. position in international rankings from 19th to 12th place in math and from 18th to 6th place in science Source: Council on American Private Education, 2001.

3. Religious and Independent Schools As a Subsidization of Public Schools

Third, far from posing a threat to the well-being of the nation's public schools, religious and independent schools actually subsidize their operation. The median parish school tuition at Catholic elementary schools throughout the nation in the current academic year is $1,787, and the average per pupil cost is $2,823. The median freshman tuition at Catholic secondary schools in the current academic year is $4,300 and the average per pupil cost is $5,700. Based on the average public school per pupil cost of $6,512, Catholic schools provide more than $17.2 billion dollars a year savings for the nation. NCEA, *United States Catholic Elementary and Secondary School Statistics, 2000-2001*, Exhibit 19, http://www.ncea.org/PubPol/databank.shtml

When the cost of education at other religious and independent schools is added to this figure, the sum that these schools save American taxpayers mounts to nearly $39 billion each year in educational expenditures. In 2000, Catholic schools educated 49.5% of all private school children and 5.5% of all school-aged children. But the percentage of students taught in major metropolitan centers, where Catholic schools constitute the vast majority of private schools, is much higher. In Philadelphia, private schools educate 31% of all

children; in New York, 23%; in Chicago, 22%. With a per pupil cost of $7,428, private schools in New York save the city $2.2 billion; in Chicago $924 million (1990 data), in Philadelphia $379.6 million, in New Orleans $109 million, in Cleveland $100 million and in Boston nearly $80 million. Joseph M. O'Keefe, "What Research Tells Us about the Contributions of Sectarian Schools," 78 *U. Det. Mercy L. Rev.* 425, 428 (2001).

Religious and independent schools are a precious national resource that is worth preserving. In 1965, 13,500 Catholic schools served 5.6 million students. In 2000 the number had dropped to 8,146 schools serving 2,575,815 students. The nation cannot afford to risk a new loss of the schools that have been found upon serious empirical investigation to have the beneficial effects described above.

In the leading case that invalidated state aid to religious elementary and secondary schools, this Court acknowledged the enormous contribution of these schools to the nation. Chief Justice Burger wrote: "Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents. The merit and benefits of these schools, however, are not the issue before us in these cases." *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971); *see also Aguilar v. Felton*, 473 U.S. 402, 415 (1985) (Powell, J., concurring). Whatever the Court was thinking of in 1971, the merit of religious schools as effective partners in American education is most emphatically before the Court in this case. In identifying the primary and principal effect of the program challenged here, the Court should take into account decades of studies of the actual effects of education in religious schools.

This Court need not reconsider whether or not *Lemon* and *Nyquist* were rightly decided decades ago. Those decisions are irrelevant to the decision of this case because the program now before this Court does not remotely resemble the Rhode Island program that sought to address the issue of imbalance of compensation between teachers at public schools and religious schools by offering a salary supplement to of secular subjects in religious schools. *Id.* at 616-20. Neither is it like the Pennsylvania program that sought to reimburse religious schools for the service of offering instruction to citizens of the Commonwealth on secular subjects. *Id.* at 620-24. Nor is it like the tax benefit invalidated by the Court in *Nyquist, supra*.

tax benefit invalidated by the Court in *Nyquist, supra*. The constitutional vice that the Court found in all of those programs was that they would tend to advance religion by offering an exclusive benefit only to parents of children attending religious schools. By contrast, the scholarship program offers financial assistance to offset some of the cost of educating children in religious schools; and tutorial assistance grants are awarded to public school children in a number equal to the scholarship grants awarded to pupils selecting alternate schools. R.C. §3313.975(A).

When viewed as complementary aspects of state concern for the education of all children, these two aspects of the Cleveland program illustrate that the beneficiary class is broad, including parents of children in all forms of schools, public, religious, and independent. Under these circumstances it is constitutionally permissible to include religious schools in a major effort to improve the quality of education for all children in Cleveland, allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

D. Empirical Data from other Countries Demonstrate that the Actual Effect of Evenhanded Educational Assistance Distributed on the Basis of "Criteria that neither Favor nor Disfavor Religion" Has not Led to "Government Inculcation of Religious Beliefs" or to "Excessive Entanglement of the Government with Religion," But has Led to a Greater Civic Sense of Responsibility for the Quality of the Education of All Children in a Variety of Settings Freely Chosen by Those Who Know Children Best, their Parents or Guardians.

As recently as two decades ago, a prominent United States Senator could observe that the United States stands out as "the only industrial nation in the world that does not routinely provide aid to nonpublic schools as part of its education system." Daniel Patrick Moynihan, "What the Congress Can Do When the Court is Wrong," in Gaffney, ed., *Private Schools and the Public Good* 79 (1980).

Our country must, of course, be faithful to our own constitution; but comparative constitutional analysis suggests that

there is not a significant difference in the textual commitment of other constitutional democracies to religious freedom. The principal difference between the United States and other constitutional democracies lies within the judicial construction placed upon the constitutional text. *Amici* do not suggest that it would be constitutionally permissible in this country for the federal government or the states to advance religion. This Court, however, has "sustained programs that provided aid to all eligible children regardless of where they attended school." *Agostini*, 521 U.S. at 231, citing *Everson v. Board of Ed.*, 330 U.S. 1, 16-18 (1947) (sustaining ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses). *See also Board of Ed. v. Allen*, 392 U.S. 236, 243-244 (1968) (sustaining law loaning secular textbooks to all children); *Mueller v. Allen*, supra, at 398-399 (sustaining statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487-88 (1986) (sustaining law granting all eligible blind persons vocational assistance); *Zobrest*, 509 U.S. at 10, (sustaining section of IDEA providing all "disabled" children with necessary aid). As noted above, the Court concluded in *Agostini* that "aid is less likely to have the effect of advancing religion ... by creating a financial incentive to undertake religious indoctrination ... where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231.

After *Agostini*, the time is ripe for a serene review of the actual effects in other constitutional democracies when all children are included in programs of public assistance to education. Such programs need not be analyzed as a zero-sum game in which one kind of school wins only at great cost to other schools. In fact, an opposite effect occurs. When all children are included within programs of public aid, parents have a greater incentive to take a direct interest in the political arrangements that allocate funds, and they tend to support greater funding for all schools. Empowering parental involvement in the education of their own children is a win-win for all children, whether they attend schools operated by the govern-

ment or those operated by religious communities or independent educators.

Solid comparative studies can now inform the Court on the principal effect of evenhandedness in governmental subsidy of education. *See, e.g.*, Stephen V. Monsma and J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Western Democracies*, 68 (1997); Charles L. Glenn, *Choice of Schools in Six Nations* (1989); and J.D. Sherman, "Public Finance of Private Schools: Observations from Abroad," in T. James and H.M. Levin, eds, *Public Dollars for Private Schools* (1983). Countries such as the Netherlands, England, and Australia approach the issue of governmental funding of religious schools in terms of neutrality or evenhandedness towards all faiths and their competing secular counterparts. On the basis of this concept of neutrality, each of these countries provides public funds for religious schools without demanding they give up their religious distinctiveness or segregate their religious and nonreligious activities. Fairness and equal treatment are the issues in these countries, not a strict wall of separation. In each of these three countries government aid to religious schools is substantively neutral; it refrains from attempting to influence religious belief by making aid available evenhandedly to any religious or secular group that wants to form a school. These governments do not give special preference to religion, but give equal opportunity to all religious and competing secularly based belief systems in education.

In the Netherlands, for example, funding for religious schools is seen as being compatible with church-state separation because public funds are available for all types of religious and secular schools. There is strong popular support for equal treatment of a variety of schools, and this policy has resulted in a wide choice of schools. As of 1993, on the primary level there were 2900 public schools, 2400 Roman Catholic schools, 2260 Protestant schools, 320 private secular schools, 76 Rudolph Steiner schools, 30 Islamic schools, 3 Hindu schools, and 2 Jewish schools. Monsma and Soper, *Challenge of Pluralism* 68. A recent study by the Organization for Economic Cooperation and Development (OECD) concluded: "the central value of freedom of choice was an aspect of Dutch education beyond debate at the present time." OECD, *Schools:*

A Matter of Choice 68 (1994); Sophie C van Bijsterveld, *The Constitutional Status of Religion in the Kingdom of the Netherlands* (1994).

England similarly provides public funding for nongovernmental religious schools. The current Labour Party government has in recent years increased the number and variety of schools within the state system that are operated by churches or other faith groups. In addition to schools operated by the Church of England and the Roman Catholic Church, the government also funds, on the same basis, Muslim, Sikh, Jewish, and Greek Orthodox schools. As in the Netherlands, the English policy of full funding for private and government schools has resulted in a wider choice of schools for parents. A recent government Green Paper on education concluded: "we welcome more schools provided by churches and other major faith groups and by other voluntary and community groups, where there is clear local demand from parents and the community." U.K. Dept. of Educ. & Employment, *Schools: Building on Success* 48 (2001); David McClean, "State and Church in the United Kingdom," in Gerhard Robbers, ed., *State and Church in the European Union* (1996).

The experience in Australia is probably most instructive of all since that country has a constitutional prohibition of an establishment of religion: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Const. of Australia § 116. The High Court of Australia ruled that the payment of federal funds money to religious schools for educational purposes does not violate this provision. In *Attorney General for the State of Victoria ex rel. Black v. Commonwealth of Australia*, 146 CLR 559, 33 ALR 321, 1981 WL 299232 (1981), the High Court rejected the claim that a law "for providing the funds for the forwarding of the education of Australians by non-governmental schools" is a law "for establishing Christian religion.," 146 CLR at 582, 33 ALR at 330. Both Chief Justice Barwick's opinion for the High Court and Justice Murphy's dissent, 146 CLR at 619, manifested deep familiarity with the jurisprudence of this Court, which the Australian High Court engaged with subtlety and nuance.

The majority of the justices in 1981 expressed views that coalesce around the nondiscrimination principle later adopted by this Court in *Agostini*, 521 U.S. at 231.

Under this decision of the High Court of Australia, Commonwealth (federal) funds go to a wide variety of religious schools in Australia including Roman Catholic (1686 schools), Anglican (120), Lutheran (72), Seventh-day Adventist (71), Baptist (42), Pentecostal (21), Jewish (19), Assemblies of God (17), Muslim (16). In addition, the state provides aid to nonreligious private schools such as Montessori (19 schools) and Rudolph Steiner (34). Monsma and Soper, *Challenge of Pluralism* 105; William L. Boyd, "Balancing Public and Private Schools: The Australian Experience and American Implications," in William L. Boyd and J.G. Cibulka, eds., *Private Schools and Public Policy: International Perspectives* 149-70 (1989).

Private schools in each of these countries are fully accountable to the government for the use of public funds. In order to receive funding, religious and independent schools in all three countries must be licensed by the government, and these schools must include instruction in a national curriculum (England) or a satisfactory curriculum (the Netherlands and Australia). *See* Australia Dept. of Educ., Employment and Training, *Commonwealth Guidelines for Schools* (1995); Monsma and Soper, *Challenge of Pluralism* 72; Richard Gold, *The School Standards and Framework Act of 1998 Explained* (1999). There is no evidence in the comparative literature that religious communities in these countries have ever perceived this degree of governmental regulation of their schools as the sort of entanglement of the government with religion that this Court has deemed "excessive." *Agostini*, 521 U.S. at 233.

Religious and independent schools thrive in these countries. The percentage of students enrolled in religious schools has increased in recent decades in the Netherlands, England, and Australia, where these schools frequently have waiting lists, which reflect a desire on the part of parents to place their children in these schools.

The data analyzed in Parts II B and C above concerning educational outputs in religious and independent schools in the United States are replicated in the Netherlands, England, and Australia, where children attending religious schools score as

high or higher than government schools on standardized tests. *See* Australia Dept. of Educ., Employment, Training, *National Report on Schooling in Australia* 186-90 (1993). The positive educational effects that have flowed from the Cleveland programs have a close and longstanding parallel in the countries whose public policy has allowed evenhanded financing of education for decades.

These positive results have been achieved without the zero-sum mentality that success in one sector of education can only come at the expense of other sectors of education. In short, religious schools in the Netherlands, England, and Australia do not threaten the well-being of schools operated by the government. On the contrary, involvement of parents in the choice of the kind of education they want for their own children has had the positive effect of improving the percent of funds allocated to education generally. *See* Dennis P. Doyle, "Family Choice in Education: The Case of Denmark, Holland, and Australia," in William L. Boyd, *Private Schools and Public Policy: International Perspectives* (1989).

These countries do not provide any empirical evidence to support the claim that funding of the education of children in religious schools leads to political divisiveness among parents or educators. On the contrary, a regime of evenhanded funding of all sorts of educational efforts has led to a broad and thick consensus about the importance of education to the future of democracy. William L. Boyd, "Balancing Public and Private Schools: The Australian Experience and American Implications", in Boyd, *Private Schools and Public Policy* U.K. Dept. of Educ. & Employment, *Schools Building on Success* (2001). The acrimony that frequently surrounds the debate in this country on funding of education in religious schools is simply not present in democracies that have lived for decades with a policy of allocating aid "on the basis of neutral, secular criteria that neither favor nor disfavor religion," and of making it "available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231.

Public funding for religious schools is not only consistent with the norm of substantive neutrality, but also promotes two key values often associated with liberal democracy: choice and social pluralism. Government funds make private education more affordable for low- and middle-income parents who

choose to exercise that option. Parents who want a religious education for their children, or a secular education with certain special teaching techniques or philosophies such as Montessori, are empowered to exercise this parental liberty systematically in the Netherlands, England, and Australia. *See* OECD, *Schools: A Matter of Choice* 71 (1994); U.K. Dept. of Educ. & Employment, *Review of the New Schools Policy* 15 (1995).

State funding for religious schools in the Netherlands, England, and Australia has had the effect of strengthening social pluralism by preserving cultural identity. Public aid to religious schools in these countries recognizes the fact that religious and ethnic life is lived out through community organizations like the schools, and it empowers individuals and groups at local levels to participate in the decisions that are most important to them. Other democracies have long recognized that "genuinely independent and private choices of aid recipients," *Witters*, 474 U.S. at 487, do not pose a realistic threat that *the government* would inculcate religious beliefs, favor religion, or become excessively entangled in religion.

The fundamental undergirding of the constitutional arrangements in each of these countries is an acknowledgement of the parental liberty interest that this Court secured over seventy-five years ago in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), see Edward McGlynn Gaffney, Jr., "*Pierce* and Parental Liberty as a Core Value in Educational Policy," 78 *U. Det. Mercy L. Rev.* 491 (2001). What the experience of democracies all over the world, such as the three surveyed here, adds to *Pierce* is that it is possible to move in the direction of empowering parental liberty through funding schemes that make education in alternative schools affordable in a manner that has not in fact led over time to "government inculcation of religious beliefs," *Agostini*, 521 U.S. at 223, has in fact been distributed on the basis of "criteria that neither favor nor disfavor religion," *id.* at 231, and has not in fact led to "excessive entanglement of the government with religion," *id.* at 233. In short, comparative constitutional analysis can shed considerable light on the important question presented in this case.

Conclusion

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Appendix A
Statements of Interest of Amici Curiae

The Association of Christian Schools International [ACSI] is a nonprofit, non-denominational, religious education association providing support services to more than 4,000 Christian preschools, elementary, and secondary schools in the United States. More than 160 postsecondary institutions are also members of ACSI. ACSI's international office is located in Colorado Springs, Colorado. ACSI member schools located in the Ohio River Valley are served by a regional office in Canton, Ohio.

California Catholic School Superintendents is an association of the Superintendents of Catholic elementary and secondary schools in the twelve dioceses of California: Fresno, Los Angeles, Monterey, Oakland, Orange, Sacramento, San Bernardino, San Diego, San Francisco, San Jose, Santa Rosa, and Stockton. These dioceses support 597 elementary schools serving 182,595 children, and 113 secondary schools serving 71,983 children. All of these schools are nondiscriminatory on the basis of race and ethnicity. They are "majority minority" schools; 56.39% of the students in the elementary grades (1-8) are minority students; and 50.46% of the students in the secondary grades are minority students. Statewide, 97.2% of the 12th grade graduates of Catholic high schools in California matriculated into college.

The Connecticut Association of Independent Schools [CAIS] is a voluntary association of 90 religious and independent nursery, elementary and secondary schools in Connecticut, with a broad range of types of schools, including Jewish day schools, Catholic schools (diocesan, religious order, and lay-governed), and an Islamic school. It includes one of America's oldest schools, Hopkins in New Havem founded in 1660. CAIS is affiliated with the National Association of Independent Schools, and with the Connecticut Council on American Private Education.

The Connecticut Council on American Private Education [ConnCAPE] is affiliated with the Council on American Private Education. ConnCAPE's membership reflects a wide diversity of religious and independent schools, including: Hartford Archdiocesan School System, Norwich Diocesan School System, Connecticut Catholic Conference, Immanuel Lutheran School System, Bridgeport Diocesan School System, Connecticut Federation of Catholic School Parents, Montessori School of Greater Hartford, and the Connecticut Association of Independent Schools.

The Florida Association of Academic Nonpublic Schools [FAANS] is an association of 28 associations of educators who serve the educational needs about 85% of the children attending nonpublic schools in Florida. These schools include Catholic schools, Baptist schools, Seventh-day Adventist schools, and independent schools in Florida. FAANS is the State affiliate of the Council on American Private Education. FAANS works regularly with the Florida Department of Education to meet the needs of over 380,000 children in nonpublic schools in Florida.

The Florida Council of Independent Schools [FCIS] is a founding member of FAANS and is the Florida affiliate of the National Association of Independent Schools. It serves 157 independently governed schools throughout Florida, with an enrollment of over 70,000 children. Founded in 1954, FCIS remains one of oldest and largest associations of independent schools in the United States.

The Indiana Private Education Association (INPEA) provides a framework for communication and cooperation among non-public schools in Indiana. In addition, it maintains productive relationships with state and federal government and other agencies that influence quality education. INPEA serves more than 400 schools, 6000 teachers and 95,000 students pre-kindergarten to twelfth grade. The governing body of INPEA is composed of representatives from schools throughout Indiana and representatives from the following member organizations: Association of Christian

Schools International, Christian Schools International, Indiana Association of Independent Schools, Lutheran Church Missouri Synod, Lutheran Association for Elementary Education, Indiana Conference of Seventh Day Adventists, Archdiocese of Indianapolis, Diocese of Evansville, Diocese of Fort Wayne- South Bend, Diocese of Gary, and Diocese of Lafayette.

The Kentucky Non-Public Schools Commission [KNPSC], as an incorporated agency, represents over 300 private and religious schools, as well as home schooling associations in the state of Kentucky. The Kentucky State Department of Education and State Board of Education recognize the KNPSC as the accrediting agency for the private and religious schools of the state. The KNPSC also represents the interests of private school parents and faculty members in lobbying efforts before the General Assembly in Frankfort.

The Lutheran Education Association [LEA] is a professional organization linking, equipping and affirming educators in Lutheran ministries. The LEA is a member-based organization currently comprised of over 4,500 Lutheran educators in the U.S. and several other countries worldwide.

The Michigan Association of Nonpublic Schools [M-A-N-S] is an association serving Catholic Schools of the seven diocese of Michigan, Michigan District of the Christian Schools International and Michigan District of the Lutheran Church - Missouri Synod Schools. M-A-N-S operates with the voluntary support of its 540+ schools with more than 7,000 teachers educating over 137,000 students in this state.

The National Catholic Educational Association [NCEA] is the largest professional education association in the world. Its membership includes over 200,000 Catholic educators who serve 7.6 million students at all levels of Catholic education. It issues an annual statistical report on Catholic elementary and secondary schools and regular re-

search reports on the performance of Catholic schools.

The New Jersey Council for American Private Education [NJ CAPE] represents the interests of nonpublic school children in New Jersey. NJ CAPE currently consists of the following organizations: Agudath Israel of New Jersey, Archdiocese of Newark, Association of Schools and Agencies for the Handicapped Christian Schools International, Diocese of Camden, Diocese of Metuchen, Diocese of Paterson Diocese of Trenton, Independent Child Study Team, New Jersey Association of Independent Schools, New Jersey Association of Lutheran Schools, New Jersey Catholic Conference, New Jersey Conference of Seventh-day Adventist Schools, New Jersey Christian School Association, Association of Christian Schools International, Christian Schools International and New Jersey Association of Jewish Day Schools.

The New York Association of Independent Schools [NSAIS] was founded in 1947, and is incorporated under New York State Education Law. NYSAIS is a voluntary association of 152 independent nursery, elementary and secondary schools in New York enrolling some 59,000 students. It is affiliated with the National Association of Independent Schools, the New York State Coalition for Nonpublic Education and the Council for American Private Education. NSAIS is a nonprofit organization offering services to administrators, teachers, trustees and parents involved in private schools from pre-K through 12th grade. The activities of NSAIS include: advocacy for independent education, evaluation and accreditation of member schools, professional development for faculty, administrators, and trustees, legal and institutional counsel, information on legislation, regulations, statistics, educational developments, and administrative practice.

The Oregon Federation of Independent Schools [OFIS] is an Oregon non- profit corporation. The members of OFIS are religious and independent schools ranging from Kindergarten through 12th Grade. Oregon remembers that "the

child is not the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and that parents are free to choose the kind of education they deem best suited to the needs of their children.

The South Dakota Christian School Association is comprised of religious schools from all denominations, with 54 member schools throughout the State of South Dakota. The association is a member of the South Dakota Council on American Private Education.

The Southern Baptist Association of Christian Schools is a nationwide professional organization whose members are primarily sponsored by Southern Baptist churches and organizations or schools that share a common mission and vision. Our vision is to advance a system of Christian schools of excellence, uniting home, church and school in Jesus Christ through Kingdom Education so that the generations to come will know the Truth of God's Word and not forget His works, nor be taken captive by the vain philosophies of their day. Our mission is to impact the education of school-aged children toward a biblical worldview by providing information, training, fellowship and avenues for influence for pastors and educational leaders of Southern Baptist schools and churches.

The Virginia Council for Private Education [VCPE] oversees accreditation of nonpublic preschool, elementary and secondary schools in the Commonwealth. VCPE was organized in 1974 as the Virginia affiliate of the Council on American Private Education. Fourteen different associations currently comprise the VCPE membership representing over 380 academic institutions.

The Washington Federation of Independent Schools is the umbrella organization for private education in Washington State. With seventy percent of the independent student population enrolled in member schools, WFIS serves as the only statewide vehicle for regular communication and strategic development between the many diverse religious and

independent sponsoring boards. WFIS schools are affiliates of the Catholic dioceses in the state; the Association of Christian Schools International (ACSI); the Christian Schools International (CSI); Lutheran Schools; Montessori schools; the Pacific Northwest Association of Independent Schools (PNAIS); the Seventh Day Adventist Schools (SDA); and numerous other religious and independent institutions, including the Waldorf Schools, Hutterian Brethren, and those institutions with sponsorship within the Hebrew or Islamic communities. The WFIS Board of Directors consists of eighteen school heads representing the largest member constituencies elected regionally by their respective bodies. WFIS is networked with similar organizations in the other states through the Council for American Private Education (CAPE).

Appendix B
Tables

POLITICAL KNOWLEDGE OF STUDENTS IN GRADES 9-12

Students who gave correct answers to political items

School type	1	2 to 3	4 to 5
Public	50.7	30.8	18.6
Religious & Independent.	33.4	37.2	29.4

Self-described indicators of political involvement

	I could write a letter to a government office		I could make a statement at a public meeting	
School type	**Yes**	**No**	**Yes**	**No**
Public	93.1	6.9	81.7	18.3
Relig. & Indep	96.4	3.6	89.6	10.4

	I understand politics or government		My family has a say in what government does	
School type	**Yes**	**No**	**Yes**	**No**
Public	53.8	46.2	63.3	36.7
Relig. & Indep	67.0	33.0	73.3	26.7

	People should be allowed to speak against religion		Controversial books can be can be kept in public library	
School type	**Yes**	**No**	**Yes**	**No**
Public	88.0	12.0	56.0	44.0
Relig. & Indep	90.9	9.1	65.4	34.7

Source: Chapman, Chandler, & Niemi, *The Civic Development of 9th through 12th Grade Students in the United States* (1998).

Community Service Participation

School Type	Total	Voluntary	Total	For Class	Court-Ordered	Other
Public	42.0	36.3	13.2	5.9	1.5	7.7
Catholic	66.7	49.6	45.1	33.7	1.8	17.4
Private,other	56.7	49.6	21.1	10.0	1.1	12.9

Source: U.S. Dept. of Education, *Condition of Education* (1997)

Comparative SAT Scores

	Verbal	Math
National	505	514
Public	501	510
Religious	529	523
Independent	547	566

Source: U.S. Dept. of Education, *Condition of Education* (1998)